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No. 85-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

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ALVIN BERNARD FORD, OR CONNIE FORD
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONER'S BRIEF IN REPLY
TO RESPONDENT'S BRIEF IN OPPOSITION

In his Brief in Opposition respondent argues that certiorari should not be granted for three reasons: the interest in being spared from execution when incompetent is not a right; the treatment of this interest as a right would be an invitation to never-ending litigation; and counsel's assertion of this claim on behalf of Mr. Ford "only ten days" prior to execution amounts to an abuse of the writ. None of these arguments detracts from the reasons presented in the petition for granting the writ of certiorari, however, for none has merit.

Respondent argues that the interest in being spared from execution when incompetent is not a right entitled to due process protection -- it is simply "a matter for the executive or the prisoner's custodian to determine, for humanitarian reasons." However, respondent does not base this argument upon an accurate analysis of "the nature of the interest at stake," Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (emphasis in original). Instead, respondent simply characterizes the interest -- as "akin to [the interest in] clemency" and as "based upon public will and a sense of propriety ... for humanitarian reasons," Respondent's Brief at 9, 11 -- without any reference to the provisions of

Florida law that have given rise to this interest. By these characterizations, respondent argues that the interest in being spared from execution when incompetent is merely a hope in the condemned that the humane discretion of the governor will be exercised in his favor.

This unfounded, and from respondent's perspective wishful, characterization breaks down when the nature of the interest is analyzed in the way the Court has analyzed other state-created interests. The Court looks to the actual language of the state courts and state legislature which created the interest. See, e.g., Hewitt v. Helms, 459 U.S. 460, 471-72 (1983); Vitek v. Jones, 445 U.S. 480, 489-90 (1980); Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979). Where such language mandates a particular course of state action upon the existence of specified factual predicates, the individual interest created or protected thereby is an entitlement that is protected by the Due Process Clause. Hewitt, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); Greenholtz, 442 U.S. at 10 (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual").

When analyzed as the Court has taught that it should be, the interest of the condemned in Florida in being spared from execution when incompetent is precisely the kind of interest that has routinely been held to be a state-created entitlement. If the factual predicate of incompetency is demonstrated in Florida, state law mandates that the condemned person's execution be stayed during the period of incompetency. The present statute governing competency at the time of execution sets out this rule:

> (1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person....

> (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon him, he shall have him committed to the state hospital for the insane.
>
> (4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity [whereupon the Governor shall appoint a new commission of psychiatrists].

Section 922.07(1),(3),(4), Florida Statutes (1983) (emphasis supplied). Court decisions in Florida have followed the same rule for at least sixty years. See, e.g., Ex parte Chesser, 93 Fla. 590, 112 So. 87, 89 (1927) (when a person is condemned to die, "if, after judgment, he becomes of nonsane memory, execution shall be stayed"); State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 465-67, 152 So. 207, 211 (1933) ("the rule at common law is well settled that a person while insane cannot be tried, sentenced, nor executed"); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939) (if prisoner is "found to be insane, an appropriate order should be made for his custody until his return to sanity is appropriately adjudicated when the sentence should be executed"); Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984) ("[w]e agree with [Goode's] contention that an insane person cannot be executed"). Florida has thus created an entitlement -- not a "mere hope," Greenholtz, 442 U.S. at 11 -- that one will be spared from execution if incompetent.

Respondent's argument that the interest in being spared from execution when incompetent is not a right, accordingly, has no support in Florida law. While the law in other states may permit the interest to be characterized as a "mere hope" that the governor will decide to spare the incompetent from execution, the law of Florida does not.[1]

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[1] In this context, it is worth noting that the state-created interest under consideration in Solesbee v. Balkcom, 339 U.S. 9 (1950), could properly have been analyzed as a mere hope for humane disposition. Significantly, Georgia's statute at that time -- in contrast to Florida law -- did not require the governor to have the condemned examined upon a showing of incompetency or even to stay the execution upon determining that the condemned was incompetent. Disposition was wholly within the discretion of the governor:

> Upon satisfactory evidence being offered to the

In addition to arguing that the interest in being spared from execution is not a right, respondent argues that it should not be treated as a right for fear of opening up "never-ending litigation" over competency. The argument is premised upon the condemned having the opportunity to begin a new proceeding after once litigating his competency, on the basis that "his condition had significantly worsened so the prior holding [of competency] was no longer accurate." Respondent's Brief at 12.

This argument is nothing more than a plea to passion rather than reason. First, it asserts that counsel for the condemned do not operate within the ethical constraints that bind all the members of our profession -- that counsel for the condemned will assert competency claims known to be frivolous as a means of avoiding execution. Such an accusation is grave and should not be made in the absence of proof. Respondent has cited no proof, and there is none.[2] Second, the argument blatantly ignores the capacity of the courts to prevent such abuses. The doctrine of

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> Governor that the person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; ... and the Governor may, if he shall determine that the perso convicted has become insane, have the power of committing him to Milledgeville State Hospital until his sanity shall have been restored, as determined by laws now in force.

Solesbee v. Balkcom, 205 Ga. 122, 52 S.E.2d 433, 435 (Ga. 1949) (quoting § 27-2602, Georgia Code) (emphasis supplied). In order to emphasize that the Due Process Clause did not apply to a Georgia inmate's interest in being spared from execution when incompetent, the Georgia Supreme Court contrasted that interest with the interest of a California inmate created by § 1367 of the California Penal Code, which provided that "'[a] person cannot be ... punished for a public offense, while he is insane.'" 52 S.E. 2d at 437. Recognizing that this provision of California law (which is identical to Florida law) conferred "an absolute right ... upon the condemned person," the Georgia court reasoned, "To protect this right the due-process clause of the Constitution may be invoked." Id. By contrast, the court concluded, "[T]he State of Georgia not only does not confer such a right upon a condemned person, but expressly declares that he has no such right...." Id.

2 As we have noted in the petition, incompetency has been alleged in a total of only four cases among the 118 cases in which Governor Graham has signed death warrants. Further, even after Mr. Ford's case made competency a "current" issue, the issue has been raised in only two cases, despite the issuance of 38 death warrants during that period of time.

law of the case prevents relitigation of issues already settled in the same case. That doctrine is independently applicable in habeas cases, and it also informs the rule barring successive petitions which seek to relitigate issues already decided. These doctrines would obviously permit summary dismissal and final disposition of a second competency claim in the same case within the period covered by a death warrant in Florida, unless the mental status of the condemned has so substantially deteriorated since the first claim as to warrant plenary redetermination. In this event, both the law of the case doctrine, see, e.g., Westbrook v. Zant, 743 F.2d 764, 768-69 (11th Cir. 1984); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967), and the successive habeas rule, see, e.g., Sanders v. United States, 373 U.S. 1, 15-17 (1963), would permit relitigation. The need for finality is tempered by the demands of equity in our system of justice, and this principle is applicable in all cases -- civil and criminal, capital and noncapital.

Finally, respondent argues that Mr. Ford has abused the writ and thus should not have his case reviewed even if the merits warrant review. Respondent's claim of abuse rests upon the following: "Petitioner's counsel were well aware of his condition and yet never approached a court until ten days prior to his execution." Respondent's Brief at 13. By analogizing Mr. Ford's circumstances to those presented in Hutchins v. Woodard, ___U.S.___, 104 S.Ct. 752 (1984), respondent argues as well that Mr. Ford provided "no explanation as to why the claims were not raised earlier or why they were not all raised in one petition." Id. at 754. This argument is disingenuous, for it misrepresents the material facts.

The claim on behalf of Mr. Ford was by no stretch of the imagination asserted at the "last minute," nor was it asserted without explanation as to why it was not raised earlier or in the previous petition. These matters were fully aired before the Eleventh Circuit, were fully discussed in that court's stay decision, Ford v. Strickland, 734 F.2d 538, 539-40 (11th Cir.), motion to dissolve stay denied sub nom. Wainwright v. Ford,

___U.S.___, 104 S.Ct. 3498 (1984), and were decided against respondent. In sum, the facts of record, as discussed in that opinion, show: (a) that Mr. Ford was competent when his first petition was filed and decided; (b) that Mr. Ford subsequently became incompetent, and when his counsel realized he had become incompetent, immediately pursued available state remedies on behalf of Mr. Ford; (c) that Mr. Ford pursued his state remedies for six months thereafter and exhausted those remedies only when the governor signed his death warrant; and (d) that Mr. Ford was in court asserting the claim of incompetency within a few days after his warrant was signed. On these facts, fully presented at every opportunity by counsel for Mr. Ford, there is no abuse of the writ.

In conclusion, we wish to draw the Court's attention as well to an argument not advanced by respondent. Respondent has not taken issue with the argument that the Eighth Amendment prohibits execution of the incompetent. Such an omission is telling, for even at this stage of the proceedings, it is a concession to the justice of Mr. Ford's cause. Moreover, it is a concession that respondent has consistently made. Wainwright has never argued in this case that the Eighth Amendment does not forbid execution of the incompetent. Indeed, he has always recognized the great significance of this question, as reflected in his request to the Eleventh Circuit to decide it initially en banc. See Petition for Writ of Certiorari at 3.

In this light, the Court's observation that it "has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane ...," Wainwright v. Ford, 104 S.Ct. at 3498 n.*, takes on special significance. Respondent has provided no reason, nor even argument, why this determination should not now be made in Mr. Ford's case. The writ of certiorari should thus be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD H. BURR III, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served a copy of Petitioner's Brief in Reply to Respondent's Brief in Opposition on counsel for respondent by depositing same in the United States Mail, first class postage prepaid to Honorable Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 32301, this 7th day of November, 1985.

Richard H. Burr III
RICHARD H. BURR III